17

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 121.

SOUTHERN PACIFIC RAILROAD COMPANY, D. O. MILLS and HOMER S. KING, Trustees, and CENTRAL TRUST COMPANY OF NEW YORK, Trustee,

Appellants,

against

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLANTS.

MAXWELL EVARTS,
Of Counsel for Appellants.

C. G. Burgoyne, 70 to 76 Spring Street, New York.

Supreme Court of the United States,

OCTOBER TERM, 1911.

No. 121.

SOUTHERN PACIFIC RAILROAD COMPANY, D. O. MILLS and HOMER S. KING, Trustees, and CENTRAL TRUST COMPANY OF NEW YORK, Trustee,

APPELLANTS,

AGAINST

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLANTS.

Statement.

By the third section of the act of Congress approved July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad

and telegraph line from the States of Missouri and Arkansas to the Pacific Coast" (14 U. S. Stats., 292), lands were granted to the Atlantic and Pacific Railroad Company in aid of its projected line from the town of Springfield, Missouri, to the Pacific Ocean (Act printed in full in Appendix, page 1), and by the eighteenth section of this act, a grant of lands was made to the Southern Pacific Railroad Company known as the "Southern Pacific *Main* Line Grant". Lands of the "*Main* Line Grant" are not involved on this appeal.

By section 23 of the act of Congress approved March 3, 1871, and entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road and for other purposes" (16 U. S. Stats., 573, 579), a grant of land was made to the Southern Pacific Railroad Company of California in aid of a line of railroad from a point at or near Tehachapa Pass by way of Los Angeles to the Texas Pacific Railroad at or near the Colorado River. This grant is known as the "Southern Pacific *Branch* Line Grant," and was made upon like terms and conditions as the grant to the Southern Pacific Railroad Company by the eighteenth section of the act of July 27, 1866 (Appendix, page XVIII).

The Branch Line Grant to the Southern Pacific Railroad Company under the act of March 3, 1871, while upon like terms and conditions as the Main Line Grant was however subject to the proviso that it should "in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company" (Appendix, page XXI).

These three grants (the grant to the Atlantic and Pacific and the Main Line and Branch Line grants to the Southern Pacific) were made upon the terms and conditions of the third section of the Atlantic and Pacific Act which described (in States) primary or granted limits of ten alternate sections (*i. e.*: twenty miles) in width on each side of the railroad line adopted by the company, and indemnity limits extending ten miles beyond such primary limits (Appendix, page VII).

The Atlantic and Pacific Railroad Company never built any portion of its projected railroad in the State of California, and on the 6th day of July, 1886, an act of Congress was passed (24 U. S. Stats., 123) forfeiting whatever rights the Atlantic and Pacific Railroad Company may have had in said lands under the act of July 27, 1866,

and restoring said lands to the public domain (Appendix, page XXII).

The lands in controversy in this suit are within the indemnity limits of the grant to the Southern Pacific Railroad Company under the act of March 3, 1871, and within the place limits and indemnity limits of the grant to the Atlantic and Pacific Railroad Company under the Act of July 27, 1866 (Record, page 11).

On November 10, 1902, the Southern Pacific Railroad Company duly filed its application in the Department of the Interior to select the lands involved as indemnity lands under its grant of March 3, 1871, and on June 30, 1903, a patent was issued by the United States to the Southern Pacific Railroad Company for said lands (Record, p. 12).

Thereafter, and on July 17, 1905, the United States filed in the Circuit Court of the United States for the Southern District of California, its bill of complaint seeking to quiet its title to said lands, and to have vacated and annulled the patents for said lands issued by the United States to the Southern Pacific Railroad Company (Record, page 5). The Circuit Court being of the opinion that the questions involved had already been determined by prior decisions of this Court

granted the prayer of the bill, and a final decree was entered on March 18, 1907, adjudging that the patents issued by the United States to the Southern Pacific Railroad Company for the lands involved should be canceled and annulled (Record, page 70).

From this decree an appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit, and the decree of the Circuit Court was there affirmed (Record, page 424).

From the decree of the Circuit Court of Appeals affirming the decree of the Circuit Court this appeal has been taken, and the single question presented in this case is this—

Is the Southern Pacific Railroad Company entitled to select land within the indemnity limits of its grant of 1871 which is at the time of selection a part of the public domain?

Specification of Errors.

The United States Circuit Court of Appeals for the Ninth Circuit erred,

I. In affirming the decree of the court below directing the cancellation of the patents of the land in controversy.

II. In not reversing said decree.

III. In not holding that the Southern Pacific Railroad Company was entitled to select the lands in question as indemnity for losses within its place limits for the reason that at the time of such selection said lands were part of the public domain.

IV. In holding that the Southern Pacific Railroad Company was not entitled to select the land in question within the indemnity limits of its grant under the act of 1871, for the reason that said lands were also within the limits of the grant to the Atlantic and Pacific Railroad under the act of 1866.

V. In not holding that the act of July 6, 1886, forfeiting the lands granted to the Atlantic and Pacific Railroad Company, forfeited only the rights to said land of the Atlantic and Pacific Railroad Company, and that, as soon as said lands became by forfeiture part of the public lands of the United States, the Southern Pacific Railroad Company was entitled to select therefrom indemnity lands in lieu of lands lost within the place limits of its grant.

VI. In not holding that the status of lands within the indemnity limits of a railroad grant

at the date of selection determines the right of the railroad to such lands. If then public lands, they are open to selection, without regard to the fact that at some prior time they may not have been public lands and may not have been open to selection.

FIRST POINT.

The Southern Pacific Railroad Company under its Branch Line Grant of March 3, 1871, was entitled to select the lands in question in lieu of lands lost within the place limits of its grant.

It is established law that a railroad is entitled to select indemnity lands from any lands within the indemnity limits of its grant which at the time of selection are public lands. The Government undertakes now to make a distinction between the case at bar and the rule established by this Court. While the lands in controversy were unquestionably public lands at date of selection and under the ordinary rule were open to selection by the Southern Pacific, yet the United States now insists that because of prior decisions of this Court in reference to this particular grant, the

ordinary rule does not apply, and that these lands, which were at one time within the grant to the Atlantic and Pacific Railroad, cannot be selected by the appellants as indemnity for the losses within the place limits of its grant.

In *Ryan vs. Railroad Company*, 99 U. S., 382, the land in question was embraced within the indemnity limits of the grant in aid of the California and Oregon Railroad Company under the act of July 25, 1866 (14 U. S. Stats., 239). At the time of the grant to the Railroad Company the land was not public land, but was claimed to be within the boundaries of a prior Mexican grant. Between the date of the granting act and of the selection of the land by the Railroad Company as indemnity land, and about a year prior to such selection, this Court held the Mexican grant invalid, and the land was then and thereby restored to the public domain. It was decided by this Court that whereas the rights of the company under such a grant in respect to lands within *primary* limits depend upon the status of the lands as public lands or otherwise at the date of the act, and the time of definite location, the right to lands within *indemnity* limits does not depend upon the status of such lands at the date of the granting act, but upon their status

as public lands or otherwise at the time of selection. In the course of his opinion Mr. Justice SWAYNE said at page 388:

> "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose. It was taken to help satisfy the grant to the extent that the odd sections originally given failed to meet its requirements. When so selected there was no Mexican or other claim impending over it. It had ceased to be *sub judice*, and was no longer in litigation. It was as much 'public land' as any other part of the national domain. The patent gave the same title to the appellee that a like patent for any other public land would have given to any other party. The Mexican claim when condemned lost its vitality. From that time, as regards the future, it ceased to be a factor to be considered, and was in all respects as if it had never existed. In this state of things the appellee acquired its title, and that title is indefeasible."

In the present case lands within the indemnity limits of the "Southern Pacific *Branch* Line Grant," which was also embraced within the primary and indemnity limits of the Atlantic and Pacific Grant, is now since the Forfeiture Act of

1866 (except so far as indemnity rights therein of the Southern Pacific Railroad Company are concerned) as much a part of the public domain of the United States as was the land in the *Ryan Case*, which, when the claim under the Mexican grant was forfeited, was restored to the public domain and open to selection by the California and Oregon Railroad Company. The right of the Southern Pacific to select such lands within its indemnity limits is entirely unaffected by the past history of that land. The Atlantic and Pacific Grant when forfeited "ceased to be a factor". It is as if the grant to the Atlantic and Pacific "had never existed". Just as much as in the *Ryan Case* the Mexican claim when condemned "ceased to be a factor" and was deemed to have "never existed," so far as the right of the California and Oregon Railroad to select indemnity lands from within the limits of the Mexican grant was concerned. The question is, what is the land now when selection is sought to be made? Is it now public land or not? If it is now public land, then it is of no importance whatever, what parties in the past may have had claims or rights thereto, and it would seem absolutely immaterial whether the title to such land had formerly been claimed under a Mexican

title thereafter declared void (as in the *Ryan Case*) or in a grant of the United States subsequently declared forfeited as in the case at bar.

In *Alabama and Chattanooga R. R. Co.*, XX. L. D., 408, it appeared that the land in question had been taken under a homestead entry at the time the railroad made application to select the same as within its indemnity limits. The claim under the homestead entry was afterwards relinquished to the United States, "thus leaving the question wholly between the company and the United States" as to whether the railroad was entitled to the land after its restoration to the public domain. Secretary Smith held that:

> "While the selection in question could not properly have been allowed at the time made by reason of Morton's entry, yet it now appears that such entry never ripened into a patent, but was relinquished to the United States. That being true, I see no reason why the selection may not now be approved" (p. 409).

In *Southern Pacific R. R. Co.*, XXVI. L. D., 452, it was held by Secretary Bliss that:

> "Lands excepted from the grant to the Southern Pacific by homestead entries that

were existing at the date when the grant took effect, may be taken on behalf of said grant in lieu of mineral lands, if at the date of selection such entries have been canceled, and the lands are free from other claims or rights" (Syllabus).

Since the *Ryan Case* the decisions of the Department of the Interior have been invariably to the effect that the status of lands within indemnity limits at the time of selection determines entirely the right of the railroad thereto.

In *Allers vs. Northern Pacific R. R. Co.*, 9 L. D., 452 (1899), Secretary Noble held that:

> "A tract is not excluded from indemnity selection by reason of its being within the *primary limits* of another grant, if it is in fact vacant public land at date of selection, and otherwise subject to such appropriation" (Syllabus).

In *Northern Pacific R. R. Co. vs. Halvorson*, 10 L. D., 15 (1890), Secretary Noble held that:

> "The right to *select indemnity* is not defeated by the fact that the land is within the *primary limits* of another grant, if the land is excepted from such grant, and vacant public land at date of selection" (Syllabus).

In *Missouri, K. & T. Ry. Co. vs. Beal*, 10 L. D., 504 (1890), Secretary Noble held that:

> " Prior to selection, the right to indemnity lands is only a float; and the right acquired by selection is dependent upon the status of the lands at date of selection, and not at date of withdrawal " (Syllabus).

In *Northern Pacific R. R. Co. vs. Moling*, 11 L. D., 138 (1890), Secretary Noble held that:

> " The right to select a tract as indemnity under a railroad grant, is not defeated by the mere fact that the selection is within the *primary limits* of another grant, if the tract is vacant public land at date of selection " (Syllabus).

In *Hensley vs. Missouri, K. & T. Ry. Co.*, 12 L. D., 19 (1891), Secretary Noble held that:

> " The right to take a tract of land as indemnity is determined by its status at the date of selection and not at date of withdrawal " (Syllabus).

In *Northern Pacific R. R. Co. vs. Bass*, 13 L. D., 201 (1891), Acting Secretary Chandler held that:

> " The mere fact that a tract is within the *geographical* limits of another grant will not defeat the right to select the same as indemnity, if it is otherwise subject to selection " (Syllabus).

In *Hastings and Dakota Ry. Co. vs. St. Paul, M. & M. Ry. Co.*, 13 L. D., 535 (1891), Acting Secretary Chandler held that:

> "The right acquired by an indemnity selection is dependent upon the status of the land at date of selection" (Syllabus).

In *St. Paul, M. & M. R. Co. vs. Munz*, 17 L. D., 288 (1893), Secretary Smith held that:

> "A tract of land within the *primary limits* of one grant, and the *indemnity limits* of another, may be selected by the latter, on proper basis, if excepted from the grant to the former, and free from other claims at date of selection" (Syllabus).

In *South and North Alabama R. R. Co. vs. Hall*, 22 L. D., 273 (1896), Secretary Smith held that:

> "The status of indemnity lands at the date of selection, not definite location of the road, determines the right of the company thereto" (Syllabus).

In *Southern Pacific Railroad Company vs. McKinley*, 22 L. D., 493 (1896), Secretary Smith held that:

> "The right of a railroad company to take a tract of land as indemnity must be de-

termined by the status of such tract at the date of the application to select the same" (Syllabus).

The *Ryan Case* has since its decision always been referred to with approval by this Court. The decisions of the Interior Department since the *Ryan Case* have been in accord therewith. It is inconceivable that the doctrine of the *Ryan Case* so important in land grant law and so long established should be overturned by a decision of this Court in which there was no discussion of or reference to the *Ryan Case*. We therefore respectfully submit, that the Southern Pacific Railroad is now entitled to select from within the indemnity limits of its Branch Line Grant, lands granted to the Atlantic and Pacific Railroad which were restored to the public domain by the Forfeiture Act of 1886, and were public lands of the United States, at the date of selection by the Southern Pacific and the issue of the patents therefor.

Government's Claim of Res Adjudicata.

There is no pretense on the part of the Government that the Southern Pacific Railroad Company is not entitled to indemnity lands to take the place of losses within its primary limits.

Upon this point the court below said at page 425 of the record:

> "It is not claimed by the United States that the Southern Pacific Railroad Company did not earn the lands granted to it nor that it was not entitled to make indemnity selections, to take the place of odd-numbered sections within the primary limits of the grant, to which it failed to acquire title."

The ground alleged for the cancellation of the patents issued in this case is that this Court has already decided that the Southern Pacific Railroad Company is not entitled to any indemnity land under its Branch Line Grant within the limits of the forfeited Atlantic and Pacific Grant, and the whole discussion centers upon the decision in *Southern Pacific Railroad Company vs. United States*, 168 U. S., 1.

It is important to note that the lands in controversy in this suit were not within the limits which were involved in the suit in 168 U. S., 1.

There is no need to consider at all the prior cases decided by this Court in 146 U. S., for the reason, that the lands involved in those suits were lands within the *place* limits of the Southern Pacific Branch Line Grant. In the first of the cases (146 U. S., 570), the con-

troversy related entirely to *place* lands of the Southern Pacific Branch Line Grant and their conflict with Atlantic and Pacific *place* lands. In the second case (146 U. S., 615), the lands were *place* lands of the Southern Pacific Branch Line Grant and *indemnity* lands of the Atlantic and Pacific Grant, and the question decided in those cases was, that the Atlantic and Pacific Railroad had filed a good and sufficient map of definite location and had a vested claim to land in its place limits and a prospective right to land within its indemnity limits, as of the date of the granting act (Act of July 27, 1866), and that upon the forfeiture of such lands, the Southern Pacific could not take title to any of said lands within its primary or place limits, as the only place lands it was entitled to under its grant were lands free from any claim at the time of the filing by the Southern Pacific Railroad of its map of definite location in accordance with the decision of this Court in *Newhall vs. Sanger*, 92 U. S., 761.

We of course do not have to point out here that it was impossible for the question arising in the case at bar—as to the right of the Southern Pacific to select lands within the indemnity limits of its grant which were public lands at

the date of selection—to have been considered in any way in the cases in 146 U. S., 615, for the reason that there the lands in controversy were *place* lands, while here the lands in controversy are *indemnity* lands. In the course of his opinion, Mr. Justice BREWER was most careful to indicate that his decision was limited entirely to the *place* lands as distinguished from *indemnity* lands and said at page 618:

> "It must be borne in mind that these lands were in the granted limits of the Southern Pacific, and *that they are not lands in respect to which that company would have a right of selection, and might defer the exercise of that right until such time as suited it.* Being within the granted limits of the Southern Pacific, all its rights thereto vested at once, at the time of the filing of the map of definite location, and were not and could not be added to after that time; everything it could have in those lands it had then, and at that time there was an existing prospective right on the part of the Atlantic and Pacific Company to make a selection."

The Government will undoubtedly concede that the cases decided by this Court in 146 U. S., have no application of any kind to the question now before the Court. The claim that the Southern Pacific is barred from now raising this

question must necessarily be based (as it was in the opinion below) upon the decision in 168 U. S., 1. It is, therefore, important that this Court should have a clear and complete understanding of the precise question which was determined by the Court in that case, and we know of no better way of stating what was there decided than the statement of the case made by Mr. Justice BREWER in the subsequent case of *Southern Pacific Railroad Co. vs. U. S.*, 183 U. S., 519.

In the case in 183 U. S., the lands involved were (1) place lands of the Southern Pacific Main Line Grant conflicting with place lands of the Atlantic and Pacific Grant; (2) place lands of the Southern Pacific Main Line Grant and indemnity lands of the Atlantic and Pacific Grant; (3) indemnity lands of the Southern Pacific Main Line Grant in conflict with indemnity lands of the Atlantic and Pacific Grant; and (4) indemnity lands of both the Main and Branch Line Grants to the Southern Pacific Railroad in conflict with the place and indemnity lands of the Atlantic and Pacific Grant.

This Court decided the case in 183 U. S., in favor of the claim of the Southern Pacific Railroad Company in so far as the conflict between the place lands of the Main Line Grant and the place lands of

the Atlantic and Pacific Grant were concerned, and dismissed "the appeal as to all other lands without prejudice to any other suit or action" (183 U. S., 535).

This dismissal without prejudice as to the lands within the indemnity limits of the Southern Pacific Main and Branch Line grants was because the adjustment of such claim was properly to be left to the Land Department which in its conclusions was to be guided by the decision of this Court in 183 U. S., the Court saying at page 535:

> "It having been adjudged that the Southern Pacific, by the construction of its road eastward from Mojave to Needles, became entitled to the benefit of the grant made by the eighteenth section of the act of 1866, the adjustment of the grant is properly to be had in the Land Department, *subject, of course, if necessary, to further contests in the courts.*"

In this case in 183 U. S., 519, the United States insisted that the Railroad Company was estopped from raising the questions involved by reason of the decision of this Court in 168 U. S., 1, which is now relied on by the Government as a bar. The whole controversy, therefore, in the case in 183 U. S., 519, centered upon this decision in 168

U. S., 1, and this Court was not impressed by the claim of the Government that the decision in 168 U. S., 1, was a bar to the case in 183 U. S., 519, and declined to sustain the Government's contention, and said with reference to the prior decision in 168 U. S., 1, at page 532, as follows:

> "*Obviously the fact settled by the decisions in those cases was the filing by the Atlantic and Pacific of an approved map of definite location. Upon that the controversy hinged. Such a map having been filed the title of the Atlantic and Pacific vested as of the date of the act of July 27, 1866, and inasmuch as the Southern Pacific claimed only by a grant of date March 3, 1871, it took no title. This which is apparent from the foregoing quotations is emphasized by the full discussions in the opinions, as well as by the allegations in the pleadings upon which the cases were tried. That fact having been determined must be taken in the present suit as not open to dispute.*" * * *
>
> "But it was not adjudged in those cases either that the Southern Pacific had no title to any real estate by virtue of the act of 1866, or that if there was any real estate to which it had any claim or right by virtue of that act, such claim was not of equal force with that of the Atlantic and Pacific. The general statement at the close of the quotation from 146 U. S., 607, 'that the latter company has no title of any kind to these

lands,' and the similar statement in paragraph 3 of the quotation from 168 U. S., 61, are to be taken as applicable only to the facts presented, and cannot be construed as announcing any determination as to matters and questions not appearing in the records. Of course, the decrees that were rendered in those cases are conclusive of the title to the property involved in them, no matter what claims or rights either party may have had and failed to produce, but as to property which was not involved in those suits they are conclusive only as to the matters which were actually litigated and determined. 'On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action' (*Cromwell v. County of Sac*, 94 U. S., 351, 356). 'The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided.' (*Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S., 683, 687). The question here presented was not determined in the prior cases, and is whether the Southern Pacific acquired any title to lands other than those involved in those suits by virtue of the act of 1866, and that question,

as we have seen, must be answered in the affirmative." * * *

"Our conclusions, therefore, are that the United States, having become by the forfeiture act of July 6, 1886, repossessed of all the rights and interests of the Atlantic and Pacific in this grant within the limits of California, hold an equal, undivided moiety in all the odd-numbered sections which lie within the conflicting place limits of the grant to the Atlantic and Pacific and of that made to the Southern Pacific by the act of July 27, 1866; and that the Southern Pacific holds the other equal, undivided moiety therein."

These three cases (146 U. S., 570; 146 U. S., 615; and 168 U. S., 1) determined therefore one thing and one thing only, to wit, that the Southern Pacific Railroad Company took no place lands under its grant of March 3, 1871, which were in conflict with the Atlantic and Pacific Grant. This was the precise question settled in the two cases in 146 U. S., in which it was held that the Atlantic and Pacific had filed an approved map of definite location and that therefore the interests of the Atlantic and Pacific in its grant became vested as of the date of the act of July 27, 1866, and that therefore the Southern Pacific Railroad by reason of its grant of March 3, 1871, took no title therein of any

kind at the date of its grant. There was no suggestion in these cases as to the right of the Southern Pacific with reference to its indemnity lands under the Branch Line Grant. Then came the case in 168 U. S., 1, in which again the Railroad tried to raise the question of the validity of the Atlantic and Pacific map already decided in the cases in 146 U. S., and the Court in 168 U. S., 1, discussed no other question, but simply said that upon this point of the validity of the maps filed by the Atlantic and Pacific the question was determined by the prior decisions in 146 U. S.

This Court, in 183 U. S., 519, was careful to point out that the only lands involved in 168 U. S., 1, were "granted" or place lands, and Mr. Justice BREWER, in speaking of the lands in controversy in 168 U. S., 1, said at p. 529:

> "The lands in controversy in those suits were lands within the *granted* limits of both companies at the place of conflict."

We therefore have this situation, that in no decision yet of this Court has it been held that the Southern Pacific Railroad has not the right to select its indemnity lands from the forfeited limits of the Atlantic and Pacific Grant.

In other words this Court has never considered the question of whether the right to select these indemnity lands is not within the well-established doctrine of the *Ryan Case*. We say that it is, and that no intimation to the contrary can be found. The law is settled that any railroad company can select any lands within its indemnity limits so long as they are public lands at the time of selection, without reference to what their character may have been theretofore. Now no reason is suggested and never has been suggested or passed upon by this Court as to why this particular grant should be deemed an exception to the general rule. This proposition has never been discussed or decided by this Court.

It is true that in the case of *Southern Pacific Railroad Company vs. United States*, 189 U. S., 447, the conflict of the grant to the Southern Pacific Railroad Company under the act of March 3, 1871, with the grant to the Texas Pacific Railroad Company was under consideration, and this Court said, at page 451 :

> " It is argued further, however, that if the Southern Pacific did not get the lands in question under its primary grant, it may take a part of them as indemnity lands. It is said that the company has a right to take

> them for that purpose if the status of the lands at the time of selection permits it. *Ryan v. Railroad Co.*, 99 U. S., 382. That contention seems to be disposed of by *Southern Pacific Railroad v. United States*, 168 U. S., 1, 47, 66, and the practice of the Land Department for many years has been inconsistent with it. * * * When it is decided that the company got no title to the land within its twenty mile limit, it would be contrary to the intimations of the cases to allow it to take the adjoining strip outside under a claim of indemnity. See *Bardon v. Northern Pacific Railroad*, 145 U. S., 535, 545; *Clark v. Herington*, 186 U. S., 206."

This decision delivered by Mr. Justice HOLMES means and was intended to mean simply that where as in the case before him for any reason the entire grant of place lands fails there cannot be any selection of indemnity lands. In other words as a condition precedent to the selection of indemnity lands there must be a grant of place lands which in part and not as a whole has failed. This principle has no application here.

If we are wrong in our conclusion as to what the case construing the Texas Pacific Act of 1871 decided, then we say that this Court in 189 U. S., 447, was under a misapprehension in supposing that the established doctrine in the *Ryan Case* had been overruled or was intended to

be overruled by this Court in the case of 168 U. S., 1. No reference of any kind was made thereto. The sole question there decided was that the principle of *res adjudicata*, prevented the Southern Pacific from again raising therein the question as to the validity or invalidity of the Atlantic and Pacific map of definite location. That was the entire question and there was no suggestion of overruling the settled doctrine of the *Ryan Case*, and no discussion of that case in any way whatever was had in the case in 168 U. S., 1. As was said in *Holmes v. Railroad Company*, 7 Sawy., 388, 399, "It cannot be supposed that it was the intention to overrule long-established principles without even mentioning the cases in which they were elaborately discussed and established."

In addition this Court in 183 U. S., 519, has expressly held that the case in 168 U. S., 1, was limited solely to a question of *place* or *granted* lands. Therefore it could not be a bar in regard to *indemnity* lands. At page 529 Mr. Justice BREWER in speaking of 168 U. S., 1, and the cases in 146 U. S., said:

> "The lands in controversy in those suits were lands within the *granted* limits of both companies at the place of conflict."

Just what this Court meant by saying in 189 U. S., 447, 452, that the intimations of the cases was not to allow a company to take indemnity lands when there was a loss within the place limits is not apparent, unless as has just been pointed out, the Court referred to a failure of the entire grant of place lands and not to partial losses within a valid grant. The very purpose of the granting statute was to permit a railroad company, when it lost lands within its place limits from any cause whatever to make good such loss within its indemnity limits. The greater the loss in place lands the greater the need of indemnity lands to make it good, and the cases cited do not in any way sustain the suggested intimation.

The case of *Bardon vs. Northern Pacific Railroad*, 145 U. S., 535, 545, is one of the two cases referred to by Mr. Justice HOLMES as containing this intimation. We think this statement is due to a misunderstanding of the case, resulting from an expression of Mr. Justice FIELD in the *Bardon Case*. All that Mr. Justice FIELD said was, that when land was restored to the public domain from within the place limits of a grant to a railroad, such land was not open to selection by the *same* railroad as indemnity land because it didn't fall

within the class of lands designated by the granting act as a source of supply of indemnity lands. His own words at page 545 are as follows :

> " Not only does the land once reserved not fall under the grant should the reservation afterwards from any cause be removed, but it does not then become a source of indemnity for deficiencies in the place limits. Such deficiencies can only be supplied from lands within limits *designated by the granting act or other law of Congress.*"

Of course what Mr. Justice FIELD said must be read with reference to the facts in the case before him. In the *Bardon Case* the land in controversy was within the place limits of the grant to Northern Pacific Railroad Company. At the time the railroad took title to its place lands, the land involved was not public land, and was excepted from the grant, for the reason that it had been taken up on a pre-emption claim, and the only question before the Court was, whether upon the restoration to the public domain of lands within the place limits of a railroad grant, which were reserved at the time of the grant, such lands fell within the grant. It was held that the land in question could not be acquired by the railroad as part of its place lands for the reason that it " was severed from the mass of

public lands from which the grant to the Northern Pacific Railroad Company could alone be satisfied " by the terms of the granting act. In other words, the Court held that at the time the road of the Northern Pacific was definitely fixed, the land involved was pre-empted. It did not, therefore, then fall within the grant of *place* lands and could not thereafter by reason of the cancellation of the pre-emption claim, because it was too late, the grant of the place lands by its terms only taking effect as of a certain time, viz., when the line of road was definitely fixed, which was prior to the cancellation of the claim.

It was at the same time held that the land so restored to the public domain could not be taken by the railroad as indemnity land to make up a deficiency within the place limits, for the sole reason, that such deficiency could only be supplied from lands within the indemnity limits expressly specified by Congress.

When properly understood, it is not possible to say, that the *Bardon Case* in any way conflicts with the doctrine of the *Ryan Case* above quoted. All that it held with reference to indemnity lands simply was that deficiencies in place limits could " *only be supplied from lands within limits designated by the granting act or other law of Con-*

gress." The land involved in the *Bardon Case* was not within such indemnity limits, and when the pre-emption claim thereto was canceled, it could not, therefore, be considered *a source of indemnity.*

It is perfectly clear that this Court did not undertake to decide in the *Bardon Case* that, if the pre-empted land in question had been within the indemnity lands of the Northern Pacific Grant, and the pre-emption claim had been canceled subsequent to the granting act, the railroad would not have been entitled to select such land as indemnity land after its restoration to the public domain. If any inference from the *Bardon Case* is to be drawn of any kind with reference to this question now before the Court, it would seem to be that the Court would have decided that the railroad was entitled to make such selection, for the sole reason given by the Court why the land after restoration to the public domain could not be taken as indemnity land was that it was not within the indemnity limits granted to the railroad company, implying, that if it had been within such indemnity limits, the railroad company would have been entitled to it, after it had been restored to the public domain, although it was not public land at the time of the grant.

We are unable to see that the remaining case of *Clark vs. Herington*, 186 U. S., 206, cited by Mr. Justice HOLMES in 189 U. S., 448, 452, in support of the proposition that losses within place limits cannot be made good from indemnity limits, has any application whatever to the question. The only reference in this case that we can find to indemnity lands is that :

> " No title to indemnity lands is vested until an approved selection has been made ; up to which time Congress has full power to deal with lands in the indemnity limits as it sees fit " (Syllabus).

The tract of land involved in the *Clark Case* was in an even numbered section within the place limits of the grant to the Union Pacific Railroad Company, Eastern Division. The Union Pacific, of course, received the odd sections in its place limits and the United States retained the even sections. It was also within the indemnity limits of the grant to the Missouri, Kansas and Texas Railroad Company, and was selected by the latter to make good losses within its place limits. Prior, however, to the selection of this land by the Missouri, Kansas and Texas Railroad Company, an act was passed by Congress which provided that

such even numbered sections within the place limits of the grant to the Union Pacific Railroad Company, Eastern Division, should be "rated at $2.50 per acre and subject only to entry under those [the pre-emption and homestead] laws." In other words, the lands would have been open to selection to make good losses in the Missouri, Kansas and Texas Railroad Company's place limits, if it had not been for this act of Congress passed prior to the selection of the lands by that Company.

As we look at it this *Clark Case* simply emphasizes the proposition which we are urging, viz: that whether indemnity lands are open to selection or not depends upon whether those lands are public lands at the date of selection, and not in any way what they were at any prior time. At any time prior to selection Congress may make any disposition thereof it chooses, just as it can of any other public lands.

We, therefore, respectfully submit that the Southern Pacific is not estopped by any prior decision of this Court in any case between it and the United States from now raising the question that it is entitled to select indemnity lands from the public lands of the United States within the indemnity limits of its land grant of 1871, with-

out regard to any prior claim to said lands, which had been terminated prior to the date of selection. The particular lands involved in the present case were not in controversy in any prior suit between the parties and the doctrine that this question, which might have been raised, but was not raised in any former suit, is now barred, would have reference only to lands particularly involved in the former suit. Inasmuch as in the present case the particular lands in question were not involved in any prior suit, there can be no bar except as to questions which were actually raised and determined in prior suits between the parties, and, as we have pointed out it has never yet been decided in any case that the Southern Pacific cannot select from its Branch Line indemnity limits lands within the forfeited Atlantic and Pacific Grant. The only case in which this question was fully argued and presented by the Southern Pacific to this Court, both orally and in the briefs, was the case in 183 U. S. 519, which was won by the Southern Pacific as to the main contention, and was dismissed as to the present contention, without prejudice to the right of the Southern Pacific to raise it again in a subsequent litigation. In view of this express permission to again raise this question given to

the Southern Pacific Railroad by this Court, how can the claim now be made, that the Southern Pacific is barred from raising it in the present case, by reason of a decision made prior to the decision of this Court giving express permission to again present the question to this Court.

SECOND POINT.

The judgment and decree of the court below should be reversed.

MAXWELL EVARTS,
Of Counsel for Appellants.

APPENDIX.

Atlantic and Pacific Act (14 United States Statutes at Large, p. 292).

AN ACT granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That John B. Brown, Anson P. Morrill, Samuel F. Hersey, William G. Crosby, Samuel E. Spring, Samuel P. Dinsmore, of Maine; N. S. Upham, Frederick Smyth, Onslow Stearns, S. G. Griffin, William E. Chandler, of New Hampshire; T. W. Park, H. H. Baxter, John Gregory Smith, A. P. Lyman, of Vermont; Walter S. Burges, William S. Slater, Stephen Harris, Thomas P. Shepard, of Rhode Island; William Merritt, Alexander H. Bullock, George L. Stearns, Genery Twichell, Charles H. Warren, Chester W. Chapin, of Massachusetts; John Boyd, Robert C. Wetmore, John T. Wait, Cyrus Northrop, of Connecticut; Solon Humphreys, J. Bigler, Homer Ramsdell, Isaac H. Knox, John A. C. Gray, Daniel L. Ross, A. V. Stout, M. K. Jessup, R. E. Fenton, E. L. Fancher, J. C. Fremont,

James Hoy, Jesse M. Bolles, Edward Gilbert, James P. Robinson, Oliver C. Billings, of New York ; Charles Bachelor, John Edgar Thompson, Morton McMichael, T. Haskins Du Puy, Thomas A. Scott, Charles Rickettson, William Lyon, George W. Cass, Levi Parsons, of Pennsylvania ; Charles Knap, J. L. N. Stratton, James B. Dayton, Robert F. Stockton, Alexander G. Cattell, A. W. Markley, of New Jersey ; John W. Garrett, Charles J. M. Gwinn, Robert Fowler, Jacob Tome, Thomas M. Lanahan, of Maryland ; Charles J. Dupont, Henry Ridgley, Andrew C. Gray, Nat. Smythers, of Delaware ; Bellamy Storer, George B. Senter, William Baker, Samuel Galloway, David Tod, Charles Anderson, Bird B. Chapman, Edward Sturgis, Israel Dille, of Ohio ; Edwin Peck, William D. Griswold, James P. Luse, Samuel E. Perkins, Conrad Baker, of Indiana; Richard J. Oglesby, N. B. Judd, Samuel A. Buckmaster, D. L. Phillips, L. P. Sanger, of Illinois ; Eber B. Ward, Omar D. Congar, Nathaniel W. Brooks, Alexander H. Morrison, of Michigan; Z. G. Simmons, Alexander Mitchell, J. J. Williams, G. A. Thompson, J. J. R. Pease, John H. Hersey, of Wisconsin; Henry A. Smith, Sherman Finch, William Mitchell, R. F. Crowell L. F. Hubbard, E. F. Drake, of Minnesota ; Lyman Cook, Platt Smith, Jacob Butler, Henry I. Reid, Hoyt Sherman, of Iowa ; William G. Brownlow, of Tennessee ; Thomas C. Fletcher, B. R. Bonner, John M. Richardson, Emil Pretorious, E. W. Fox, R. J. McElheny, Charles H. Howland, Madison Miller, George W. Fishback, T. J. Hubbard, George Knapp, Charles K. Dick-

son, A. G. Braun, G. L. Hewitt, P. A. Thompson, James W. Thomas, Charles E. Moss, Edward Walsh, A. R. Easton, Truman J. Horner, J. B. Eads, D. R. Garrison, W. A. Kayser, George P. Robinson, of Missouri; Thomas E. Bramlette, Benjamin Gratz, C. E. Warren, Lazarus W. Powell, John Mason Brown, Joshua Speed, of Kentucky; Solon Thatcher, Jacob Stotler, William B. Edwards, James G. Blunt, Robert McBratney, of Kansas; Harrison Hagaus, James Cook, Robert Crangle, Benjamin H. Smith, of West Virginia; Lorenzo Sherwood, A. J. Hamilton, of Texas; William Gilpin, Henry C. Leach, of Colorado; Phinneas Banning, Timothy G. Phelphs, William B. Carr, Edward F. Beale, Fred. F. Lowe, Benj. B. Reading, B. W. Hathaway, Leonidas Haskell, Frederick Billings, of California; W.S. Ladd, J. R. Moores, Walter Monteith, John Kelly, B. F. Dowell, of Oregon; James L. Johnson, Henry Connelly, Franciscus Perea, of New Mexico; J. H. Mills, A. P. K. Safford, E. S. Davis, of Nevada; King S. Woolsey, William H. Hardy, Coles Bashford, of Arizona; Henry D. Cook, of the District of Columbia; and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the "Atlantic and Pacific Railroad Company," and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal. And said corporation is hereby

authorized and empowered to lay out, locate and construct, furnish, maintain and enjoy, a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at or near the Town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said Company to a point on the Canadian River; thence to the Town of Albuquerque, on the River Del Norte, and thence by way of the Agua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route to the Colorado River, at such point as may be selected by said Company for crossing; thence by the most practicable and eligible route to the Pacific. The said Company shall have the right to construct a branch from the point at which the road strikes the Canadian River eastwardly along the most suitable route as selected to a point in the western boundary line of Arkansas, at or near the Town of Van Buren. And the said Company is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth. The capital stock of said Company shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the laws of said corporation shall provide. The persons hereinbefore named are hereby appointed commissioners, and shall be called the "Board of Commissioners of the Atlantic and Pacific Rail-

road Company," and fifteen shall constitute a quorum for the transaction of business. The first meeting of said board of commissioners shall be held at the Turner Hall, in the City of St. Louis, on the first day of October, anno Domini eighteen hundred and sixty-six, or at such time within three months thereafter as any ten commissioners herein named from Missouri shall appoint, notice of which shall be given by them to the other commissioners by publishing said notice in at least one daily newspaper in the cities of Boston, New York, Cincinnati, Saint Louis, Memphis and Nashville, once a week for at least four weeks previous to the day of meeting. Said board shall organize by the choice from its number of a President, Vice-President, Secretary and Treasurer, and they shall require from said Treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof, as they may deem proper. The Secretary shall be sworn to the faithful performance of his duties, and such oath shall be entered upon the records of the company, signed by him, and the oath verified thereon. The president and secretary of said boards shall, in like manner, call all other meetings, naming the time and place thereof. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times and in such principal cities or other places in the United States as they or a quorum of them shall determine, within twelve months after the passage of this act; to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions,

and to receipt therefor. So soon as ten thousand shares shall in good faith be subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened, at least fifteen days previous to the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by lawful proxy, then and there shall elect, by ballot, thirteen directors for said corporation; and in such election each share of said capital stock shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners, and, in case of their absence or inability, any two of the officers of said board shall act as inspectors of said election, and shall certify, under their hands, the names of the directors elected at said meeting. And the said commissioners, treasurer and secretary shall then deliver over to said directors all the moneys, properties, subscription books and other books in their possession, and thereupon the duties of said commissioners and the officers previously appointed by them shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. Annual meetings of the stockholders of the said corporation for the choice of officers (when they are to be chosen), and for the transaction of business, shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed, and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side-tracks, turn-tables and water stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops. munitions of war and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of

twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States; and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections and not including reserved numbers; *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided, further*, That all mineral lands be, and the same

are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided, further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said "Atlantic and Pacific Railroad."

SEC. 4. *And be it further enacted*, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the Company to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act the commissioners shall so report under oath to the President of the United States, and patents of lands as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall been constructed, completed and in readiness as afore-

said, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

SEC. 5. *And be it further enacted*, That said Atlantic and Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line of the most substantial and approved description, to be operated along the entire line: *Provided*, That the said company shall not charge the Government higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Atlantic and Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States, or by the Legislature of any Territory or State in which the same may be situated, to form running connections with it, on fair and equitable terms.

SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after

the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An Act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.

SEC. 7. *And be it further enacted*, That the said Atlantic and Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its roadbed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or

premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by either party to any court of record in any of the Territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon such appeal; and, in case the party appealing does not obtain a verdict more favorable, such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of said premises taken, at a sum equal to that finally awarded,

shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintenance and operation of said road. And in case any of the lands to be taken, as aforesaid, shall be held by an infant, femme covert, non compos, insane person, or persons residing without the Territory within which the lands to be taken lie, or persons subjected to any legal disability, the court may appoint a guardian, for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in the manner described, for

the purpose of ascertaining the value of, and of acquiring a title to, the same; but the judge of the court hearing said suit shall determine the kinds of notice to be served on such owner or owners, and he may in his discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred.

SEC. 8. *And be it further enacted*, That each and every grant, right and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the main line of the whole road by the fourth day of July, Anno Domini eighteen hundred and seventy-eight.

SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and

things which may be needful and necessary to insure a speedy completion of the said road.

SEC. 10. *And be it further enacted*, That all people of the United States shall have the right to subscribe to the stock of the Atlantic and Pacific Railroad Company until the whole capital named in this act of incorporation is taken up by complying with the terms of subscription.

SEC. 11. *And be it further enacted*, That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.

SEC. 12. *And be it further enacted*, That the acceptance of the terms, conditions and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act and not afterwards, and shall be deposited in the office of the Secretary of the Interior.

SEC. 13. *And be it further enacted*, That the directors of said company shall make and publish an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least six of the directors, a copy of which shall be deposited in the office of said Secretary of the Interior, and they shall,

from time to time, fix, determine and regulate the fares, tolls and charges to be received and paid for transportation of persons and property on said road or any part thereof.

Sec. 14. *And be it further enacted*, That the directors chosen in pursuance of the first section of this act shall, so soon as may be after their election, elect from their own number a president and vice-president; and said board of directors shall, from time to time, and so soon as may be after their election, choose a treasurer and secretary, who shall hold their offices at the will and pleasure of the board of directors. The treasurer and secretary shall give such bonds, with such security, as the said board from time to time may require. The secretary shall, before entering upon his duty, be sworn to the faithful discharge thereof, and said oath shall be made a matter of record upon the books of said corporation. No person shall be a director of said company unless he shall be a stockholder, and qualified to vote for directors at the election at which he shall be chosen.

Sec. 15. *And be it further enacted*, That the president, vice-president and directors shall hold their offices for the period indicated in the by-laws of said company, not exceeding three years, respectively, and until others are chosen in their place, and qualified. In case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, the corporation shall not for that excuse be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the directors. The directors, of

whom seven, including the president, shall be a quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate and effects of the company, the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors may have full power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And the said board of directors shall have power to appoint such engineers, agents and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road.

SEC. 16. *And be it further enacted,* That it shall be lawful for the directors of said company to require payment of the sum of ten per centum cash assessment upon all subscriptions received of all subscribers, and the balance thereof at such times and in such proportions and on such conditions as they shall deem to be necessary to complete the said road and telegraph lines within the time in this act prescribed. Sixty days' previous notice shall be given of the payments required, and of the time and place of payment, by publishing a notice once a week in one daily newspaper in each of the cities of Boston, New York, Cincinnati, Saint Louis, Memphis and

Nashville, and in case any stockholder shall neglect or refuse to pay, in pursuance of such notice, the stock held by such person shall be forfeited absolutely to the use of the company, and also any payment or payments that shall have been made on account thereof, subject to the condition that the board of directors may allow the redemption on such terms as they may prescribe.

SEC. 17. *And be it further enacted*, That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid or assistance which may be granted to or conferred on said company by the Congress of the United States, by the legislature of any State, or by any corporation, person or persons, or by any Indian tribe or nation through whose reservation the road herein provided for may pass; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid or assistance, to its own use, for the purpose aforesaid: *Provided* that any such grant, or donation, power, aid or assistance from any Indian tribe or nation shall be subject to the approval of the President of the United States.

SEC. 18. *And be it further enacted, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or*

fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for.

SEC. 19. *And be it further enacted*, That unless the said Atlantic and Pacific Railroad Company shall obtain *bona fide* subscriptions to the stock of said company to the amount of one million of dollars, with ten per centum paid, within two years after the passage of and approval of this act, it shall be null and void.

SEC. 20. *And be it further enacted*, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend or repeal this act.

SEC. 21. *And be it further enacted*, That whenever in any grant of land, or other subsidies, made or hereafter to be made, to railroads or other corporations, the United States has reserved the right, or shall reserve it, to appoint directors, engineers, commissioners or other agents to examine said roads, or act in conjunction with other officers of said company or companies, all the costs, charges and pay of said

directors, engineers, commissioners or agents shall be paid by the respective companies. Said directors, engineers, commissioners or agents shall be paid for said services the sum of ten dollars per day for each and every day actually and necessarily employed, and ten cents per mile for each and every mile actually and necessarily traveled, in discharging the duties required of them, which per diem and mileage shall be in full compensation for said services. And in case any company shall refuse or neglect to make such payments, no more patents for lands or other subsidies shall be issued to said company, until these requirements are complied with.

Approved, July 27, 1866.

Section 23 of the Texas Pacific Act (16 United States Statutes at Large, p. 579.)

SEC. 23. That, for the purpose of connecting the Texas Pacific Railroad with the City of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said Southern Pacific Railroad Company of California, by the Act of July twenty-seven, eighteen hundred and sixty-six: *provided, however*, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company.

Approved, March 3, 1871.

Atlantic and Pacific Forfeiture Act (24 United States Statutes at Large, p. 123).

An Act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, and to restore the same to settlement and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the lands, excepting the right of way and the right, power, and authority given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine-shops, switches, side tracks, turntables and water stations, heretofore granted to the Atlantic and Pacific Railroad Company by an act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of Congress, which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits, as contemplated to be constructed under and by the provisions of the said Act of July twenty-seventh, eighteen hundred and sixty-six, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph, be and the same are hereby, declared forfeited and restored to the public domain.

Approved, July 6, 1886.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE SOUTHERN PACIFIC RAILROAD COMPANY, D. O. Mills and Homer S. King, Trustees, and Central Trust Company of New York, Trustee, Appellants,
v.
THE UNITED STATES.
No. 121.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT, BRIEF, AND ARGUMENT FOR THE UNITED STATES.

This a bill to quiet title to certain land in California. It was brought by the United States against the Southern Pacific Railroad Company, a California corporation, D. O. Mills and Homer S. King, trustees, and the Central Trust Company of New York, trustee. These trustees are made parties by reason of their having or claiming to have a lien upon the lands in suit by virtue of mortgages executed by the Southern Pacific to secure issues of bonds. They stand, so far as this case is concerned, in the same right as the railroad company. By

24213—12—1

stipulation one Jackson Alpheus Graves was added as a party defendant. (R., 58–61.) His interest arises as a purchaser of part of the land in suit (R., 94), but as he has not appealed he may be disregarded in this consideration.

The case was submitted to the Circuit Court on May 21, 1906, on bill, answer, and replication, and on the proofs, which consisted entirely (R., 96) of stipulations as to evidence and facts (R., 72, 98, 100), and parts of the records in two former cases between the United States and the Southern Pacific, which were offered and received as complainant's Exhibits K and L (R., 104, 327). These are the cases reported in 168 U. S. 1, and 184 U. S. 49, respectively. The decree, entered March 18, 1907, adjudged the United States to be the owner of the lands in suit and enjoined the defendants from asserting any title to them. The patents issued to the Southern Pacific were ordered canceled and annulled. (R., 67.) On appeal by all the defendants excepting Graves, the Circuit Court of Appeals for the Ninth Circuit affirmed this decree on the ground that former adjudications of this court have rendered the subject matter of the controversy *res judicata*. (R., 429.) From this decision the same defendants appeal to this court.

The controversy arises because of the overlapping of the limits of the land grant to the Atlantic & Pacific Railroad Company and those of what is known as the branch line grant to the Southern Pacific Railroad Company, the overlap resulting from the intersection of the two lines.

The grant to the Atlantic & Pacific

was made by the act of July 27, 1866, c. 278, 14 Stat. 292, which statute also created the corporation and empowered it to build a line from Springfield, Missouri, to the Pacific Ocean. The grant lies in section 3, which is set out hereafter as Appendix A. There is first a primary grant, within prescribed limits, of alternate odd-numbered sections of land, not mineral, and not otherwise appropriated at the time of the filing of the map of location of the railroad. It is *in præsenti:* "that there be and hereby is granted." Then there is an indemnity grant, within other limits, of lands to be selected by the company to make up for deficiencies in the primary grant. Section 6, which is here made Appendix B, directs a survey of the lands after the fixing of the general route, and declares that the odd sections granted shall not be liable to entry except by the railroad company. The conditions of the grant pertinent here are in sections 8 and 9, hereafter printed as Appendix C.

During the year 1872 the Atlantic & Pacific filed in the Interior Department maps designating the line of the road it proposed to build. (R., 73.) These were accepted as maps of definite location and must be taken here as such. (168 U. S. 1.) Accordingly the Secretary of the Interior made formal withdrawal of the appropriate lands from other entry or disposition. The rights of the company—whatever they were, and being of course always contingent for their perfection upon their

being earned by construction of the road—were declared to attach as of the dates of filing of the maps. (R., 74.)

The Atlantic & Pacific failed to construct its road in California, and for this breach of condition all the lands, within both the granted and indemnity limits, granted to it by the act of 1866 and subsequent acts were "declared forfeited and restored to the public domain"—this by the act of July 6, 1886, c. 637, 24 Stat. 123, which is here set out as Appendix D.

The Southern Pacific branch line grant

was made by the act of March 3, 1871, c. 122, 16 Stat. 573, which created the Texas Pacific Railroad Company and authorized it to build a line from Texas to San Diego, California. To connect this line with San Francisco, section 23, which is Appendix E herein, empowered the Southern Pacific Railroad Company to construct a road over a designated route. This is the branch line. To support it the Southern Pacific was given "the same rights, grants, and privileges, and subject to the same limitations and conditions, as were granted" to it by the act of July 27, 1866 (*i. e.*, the Atlantic & Pacific act). This refers to section 18 of the act of 1866, which authorized the Southern Pacific to build a road connecting the Atlantic & Pacific with San Francisco and made to it grants "similar" to and "subject to all the conditions and limitations" attached to the Atlantic & Pacific grant made by the same act of 1866, thus referring the definition still further to section 3 of that act,

which here has been made Appendix A. Section 18 also is set out in Appendix F. It may be pointed out that the actual grant made by this section—known as the Southern Pacific main line grant—does not include the lands in suit; we are simply concerned with section 18 of the act of 1866 by reference from section 23 of the act of 1871 to define the branch line grant.

The Southern Pacific filed its map designating the route of the branch line on April 3, 1871 (R., 88), and on April 21, 1871, the withdrawals of the appropriate sections were made by the Interior Department for the benefit of the grant (R., 89). Ultimately it was fully earned (R., 88, 89) by the construction of the road. All this was done by December 6, 1877. (R., 89, 90.)

Although the Southern Pacific map was filed before the Atlantic and Pacific, the grants must be regarded as having taken effect by relation as of the dates of the respective acts. (146 U. S. 570, 595; 168 U. S. 1, 61.)

The overlapping limits

involved are the branch line indemnity limits and the Atlantic & Pacific limits both primary and indemnity. Within the common area the Southern Pacific selected the lands which are the subject of the bill as falling under the indemnity provisions of the branch line grant of March 3, 1871. The selection filed in the Los Angeles land office November

10, 1902, is admitted to have been in due form. (R., 93.) Pursuant to it patents were issued to the company on June 30, 1903. (R., 93.) These are the patents sought to be annulled.

A summary of the situation, then, shows the following:

Both parcels in the bill (described R., 11) are within the indemnity limits of the branch line grant (*i. e.*, sec. 23 of the act of Mar. 3, 1871) to the Southern Pacific (R., 92, 93).

Both are within the limits of the forfeited Atlantic & Pacific grant (*i. e.*, sec. 3 of the act of July 27, 1866), the first in the primary limits of that grant, the second in the indemnity. (R., 92, 93.)

Neither is within either the primary or indemnity limits of the main line grant (*i. e.*, sec. 18 of the act of July 27, 1866) to the Southern Pacific. (R., 92, 93.)

The map of definite location of the branch line was filed and the withdrawals were made before, and the indemnity selections under it were made long after, the forfeiture of the Atlantic & Pacific grant and its restoration to the public domain. (R., 88–90, 93.)

It is to be added that the records of the land office at Los Angeles show that within the branch line indemnity limits there remain 50,000 acres which are still open to selection by the Southern Pacific and which are not within the limits of the Atlantic & Pacific grant. (R., 93.)

The question

becomes: *Is the Southern Pacific now entitled under the indemnity provisions of its branch line grant of March 3, 1871, section 23, to select lands which at the time of that grant and of the filing and acceptance of its map and the withdrawals in pursuance thereof were subject to either the primary or indemnity provisions of the Atlantic & Pacific grant of July 27, 1866, but which subsequently, by the act of July 6, 1886, were forfeited for breach of condition by the Atlantic & Pacific and restored to the public domain?*

The defendant's contention is based on the principle that the title to indemnity lands does not accrue until the actual selection. It contends, then, that the right to select the lands in suit depends on their status, as public lands, at the date of their selection, irrespective of their status at some former time; hence, as they were public lands at the time of selection, the selection under consideration was lawfully made. In other words, it asserts that the forfeiture of the Atlantic & Pacific grant placed the lands in the category of public lands subject to the indemnity provisions of the branch line grant.

ARGUMENT.

I.

The question is res judicata because of the decision of this court in Southern Pacific Railroad Company v. United States, 168 U. S. 1.

There part of the lands claimed by the company were situated—precisely as here—within the indemnity limits of the Southern Pacific branch line

grant of 1871, and also within either the primary or indemnity limits of the forfeited Atlantic & Pacific grant of 1866. The issues were determined in favor of the Government on the ground that in view of the conditions attached to the grant and of the reservations of power in Congress contained in the act of 1866, such lands became, upon the passage of the forfeiting act of 1886, the property of the United States and by force of that act were restored to the public domain, without the Southern Pacific having acquired any interest therein that affected the United States. This ground is broad enough to include the present issue, but, what is more to the point just now, the court itself certainly considered that it was passing in part on a situation exactly like this; for it is said in the opinion by Mr. Justice Harlan (pp. 46, 47):

> The lands now in controversy are situated opposite to and are coterminous with the first, second and fourth sections of the Southern Pacific Railroad as constructed between 1873 and 1877, inclusive, and within the primary and indemnity limits of the grant to the Southern Pacific Railroad Company made by the 23d section of the Texas and Pacific act of March 3, 1871; the 61,939.62 acres patented to that company being opposite to the first and fourth sections of its road. It may be said that the lands here in dispute belong to one or the other of the following classes: Lands within the common granted limits of both the Atlantic and Pacific grant of 1866 and the Southern Pacific grant of 1871;

> lands within the granted limits of the Southern Pacific grant and the indemnity limits of the Atlantic and Pacific grant; *lands within the Southern Pacific indemnity limits and the Atlantic and Pacific granted limits; lands within the common indemnity limits of both grants.* Of those in dispute, 219,012.93 acres have not been surveyed by the United States.

Words could scarcely be clearer on the point than these.

If more is needed, we refer to the record in that case, or to the sufficient part of it that is in evidence here. (R., 104.) The patents under consideration show that the lands were within the branch line indemnity limits, for they recite "whereas, certain tracts have been selected under the said act of March 3, 1871, by * * * [the] Land Agent of the said Southern Pacific Railroad Company," etc. (R. 234, 244, 252, 260), and the description of one tract refers to it as being in the "indemnity thirty miles limits" (R., 235).

Still further confirmation is had by reference to another case between the same parties. *Southern Pacific Railroad Company* v. *United States*, 189 U. S. 447, 451–452. It was said that the contention that the company had a right to take the forfeited lands under its indemnity grant was disposed of by the case in 168 U. S. And this the court said notwithstanding the case of *Ryan* v. *Railroad Co.*, 99 U. S. 382—a case which is now strongly urged by the appellants to avoid what was in the courts below regarded and

what is here contended as the effect of the 168 U. S. case.

(The same situation as in 168 U. S. 1, was before the court in the cases of *The United States* v. *Southern Pacific Railroad Co.*, 184 U. S. 49, 53, and *Southern Pacific Railroad Co.* v. *The United States*, 200 U. S. 341. Those cases in effect constitute a reaffirmance of the 168 U. S. case.)

Under the rule, then, that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery can not be disputed in a subsequent suit between the same parties, the appellants here are precluded from asserting any indemnity rights under the act of 1871 to lands within either the primary or indemnity limits of the Atlantic & Pacific grant of 1866. 168 U. S. 48 *et seq.*

Irrespective of this, the question is disposed of by the rules that govern generally cases of conflicting railroad grants and particularly the grants here involved.

It may be readily conceded, as the defendant contends, that the right to select depends on the status of the lands at the time of selection. But there is a fundamental fallacy in the further assumption that the lands in suit had the same status as the lands the defendant was originally authorized to select; that the forfeiting act of 1886 placed the lands in the category of public lands conveyed by the branch line indemnity grant of 1866. This is precisely what the forfeiting act did not do.

The status of these lands so far as the defendant is concerned was fixed at the time of the grant of 1866: they were then lands which the defendant could not select; they were reserved for the Atlantic & Pacific. This is emphasized by the clause in the section of the act of 1871 under which the defendant now claims, providing that this section should "in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company." *Cf.* 189 U. S. 447, 449; 168 U. S. 1, 45–46. Further, by section 6 of the act of 1866, they were lands "not liable to sale or entry, or preemption, before or after they are surveyed, except by" the Atlantic & Pacific.

That status, again so far as the defendant is concerned, has in no way been changed. For the public it has been changed. The lands are now "liable to sale or entry or preemption." The act of 1886 was necessary to work this change. That was what it was intended to do and all that was intended. To give this act—which in one aspect was the enforcement of a condition subsequent that only the United States could enforce—the further effect urged for it by the defendant, to say that the condition was enforced not only for the benefit of the United States and its general public but also for that of the defendant's special grant, is to effect an enlargement of that grant that is warranted by neither the language nor the intent of any of these acts of Congress.

Reference is made to the discussion in the briefs submitted in Nos. 128 and 129 between the same

parties. What is said there is in point here. There is, it is true, the difference that one of the tracts in this bill is within the indemnity limits of the Atlantic & Pacific. But the proviso in section 23 of the branch line grant renders it quite unnecessary to consider here any distinction that might be based on the factor that Nos. 128 and 129 are concerned only with Atlantic & Pacific primary lands. See *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 615. Moreover, the forfeiture act of 1886 hit lands of the Atlantic & Pacific "embraced within both the granted and indemnity limits."

II

No question is presented by the presence of the mortgagees, Mills and King, and the Central Trust Company of New York (R., 5), and the purchaser, Graves (R., 58–61), as parties to this action; they stand in the same right as the Southern Pacific.

The conclusion of the court in the case in 168 U. S. was "that the decree must be affirmed in all respects as to the Southern Pacific Railroad Company as well as to the trustees in the mortgage executed by that company," etc., 168 U. S. 66. The same situation appears to-day.

The defendant Graves has not appealed. In any event his joinder injects no other question into the case, for his position as not being a *bona fide* purchaser is settled by the case in 184 U. S. 49.

So, as no part of the lands in suit is in the hands of *bona fide* holders, the question involved is merely as to the title and the validity of the patents to the Southern Pacific.

It is respectfully submitted that the decree herein should be affirmed.

F. W. LEHMANN,
Solicitor General.

JANUARY, 1912.

Appendix A.

[Section 3, Act of July 27, 1866, 14 Stat. 294.]

That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not

including the reserved numbers: *Provided,* That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further,* That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further,* That the word "mineral" when it occurs in this act, shall not be held to include iron or coal: *And provided further,* That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Atlantic and Pacific Railroad."

Appendix B.

[Section 6, Act of July 27, 1866, 14 Stat. 296.]

That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act, but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.

Appendix C.

[Sections 8 and 9, Act of July 27, 1866, 14 Stat. 297.]

(Sec. 8) That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-eight.

(Sec. 9) That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

Appendix D.

[Act of July 6, 1886, c. 637, 24 Stat. 123.]

That all the lands, excepting the right of way and the right, power, and authority given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine-shops, switches, side-tracks, turntables, and water-stations, heretofore granted to the Atlantic and Pacific Railroad Company by an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast", approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of Congress, which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits, as contemplated to be constructed under and by the provisions of the said act of July twenty-seventh, eighteen hundred and sixty-six, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph, be and the same are hereby, declared forfeited and restored to the public domain.

Appendix E.

[Section 23, Act of March 3, 1871, 16 Stat. 579.]

That, for the purpose of connecting the Texas Pacific railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river, with the same rights, grants and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seven, eighteen hundred and sixty-six: *Provided, however,* That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company.

APPENDIX F.

[Section 18, Act of July 27, 1866, 14 Stat. 299.]

That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for.

O